Highway Express, Inc. *and* **Earl Moates, Henry Cooper, and Edward Kay.** Cases 8-CA-13445-1, 8-CA-13445-2, and 8-CA-13445-3

April 6, 1981

DECISION AND ORDER

On August 27, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support thereof and in opposition to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Highway Express, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not herein found.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge's conclusion that Moates' account of his December 13 conversation with President Waite, to the extent credited, does not demonstrate that Waite threatened to take reprisal action against employees for engaging in union activity. The Administrative Law Judge's Decision (that section entitled "Further Evidence, Anaylsis and Conclusion") is hereby corrected insofar as it inadvertently refers to "Bonacci," rather than "Waite," in the discussion of this issue.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held in Cleveland, Ohio, on June 23, 1980, on complaint of the General Counsel against Highway Express, Inc., here called the Respondent or the Company. The complaint issued on January 30, 1980, upon charges filed by Earl Moates on December 17, 1979 (Case 8-CA-13445-1), by Henry Cooper on December 19, 1979 (Case 8-CA-13445-2), and by Edward Kay on December 17, 1979 (Case 8-CA-13445-3). The principal issue presented is whether the Respondent discharged three employees in violation of Section 8(a)(3) of the Act. There are also separate allegations of violations of Section 8(a)(1)—illegal interrogations. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Highway Express, Inc., a State of Ohio corporation, has its principal place of business in Cleveland, Ohio, where it is engaged in the interstate transportation of freight. Annually, in the course of its business, it receives gross revenues in excess of $50,000 for transportation of goods in interstate commerce. I find that this Company is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Automobile Transporters, New Trailer and Armoured Car Drivers, Mechanics and Garagemen Union Local 964, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Respondent is in the highway trucking business, operating primarily in the Detroit and Cleveland area. In the fall of 1979, shortly before the events which gave rise to this proceeding, it employed approximately 40 workmen, some garage mechanics and servicemen, but the much larger number were truckdrivers. Its principal garage is at Cleveland, where six or seven men then worked; in Detroit it has a much smaller service station, where only one man works. About once each month its trucks also go to Cincinnati and Columbus, Ohio.

The truckdrivers have long been represented, under collective-bargaining agreements, by Locals 407 and 299 of the International Teamsters Union. The garage employees were nonunion.

On November 5, 1979, four (insofar as this record shows) of the Cleveland depot employees—three mechanics and one service garageman—signed union authorization cards in favor of Automobile Transporters, New Trailer and Armoured Car Drivers, Mechanics and Garagemen Union Local 964, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, here called the Union. About noon that day Ronald Hanna, business agent of Local 964, called on Richard Bonacci, the Company's manager and personnel director, and asked for recognition as exclusive bargaining agent. Bonacci refused and asked for a Board election instead. As a result, the Local filed an election petition with the Board (Case 8-RC-11579). At a Board conference held later the parties agreed to go to an election and the election was held on December 13. The results were three in favor and three against. No ob-

jections to the conduct of the election were filed and that case was closed.

On November 5, shortly after being visited by the Teamsters business agent, Manager Bonacci asked three of the garage employees had they signed union cards; two said yes and one refused to answer his question. Nothing else was said about the Union. The manager also told the employees that thereafter they would have to punch their timecards in and out for lunch, as they always did upon arrival and departure for their shifts. He also said that day that in the future they must note, on the work orders for every vehicle requiring repair or service, just what was wrong with it, what parts were used in the repair, what work had been done, etc.

On December 14, the day after the Union had failed to win the election, the Respondent discharged a number of employees—among them two mechanics and one garage man. Shortly thereafter, the one man who had been stationed at Detroit was brought back to Cleveland, where he had worked before.

The complaint lists each of the interrogations as a violation of Section 8(a)(1) of the Act and both the lunch punch-in requirement and the work order requirement as violations of Section 8(a)(3). It also says three of the employees discharged suffered illegal discrimination in violation of the statute.

The Respondent denies the commission of any unfair labor practices. Affirmatively, it asserts that the lunch-punching requirement was necessitated by an increasing laxity in the employees in taking too much time for the alloted 30 minutes lunch allowance, and by ICC rules making work order entries lawfully necessary. As to the discharges, the Respondent contends all were necessitated by an over 50 percent drop in its business in consequence of the reduction in work it had to do for its principal customer, the Chrysler Corporation, which used to give it 80 percent of its business.

A. *Violations of Section 8(a)(1)*

Bonacci admitted, as several employees testified, that he asked them if they had signed union cards. He said he questioned both Kay and Moates; he did not recall having asked Copeland also. In the circumstances, I credit Copeland's testimony that he too was asked. I find that by Bonacci's interrogation of employees as to whether they had signed cards in favor of the Union, the Respondent violated Section 8(a)(1) of the Act.

On October 15, some weeks before the union activity started, Bonacci held a meeting for the purpose of telling the group they should do more work and not be seen so often idling. As mechanic Kay recalled it: "He just stated that he was disappointed the way things were going, productivity was down for the garage. And he said that there was going to have to be changes made." As another witness, Moates, testified: "He said we weren't performing in the garage like he felt we should. . . . Judge Ricci: He was complaining about the way the fellows worked on the output? The witness: Yes, sir." Still from Moates' testimony: ". . . He told us at that time that they weren't real pleased with the work we were getting out but we didn't have the manpower that we had before either. They laid off some of the guys so naturally when you lay off your guys you are going to go down on your work."

Bonacci's testimony is substantially consistent with that of the employees as to his talk that day. "We [Bonacci and company president, Waite] told them how displeased we were with the output of the garage, that every time we would drive in the garage, the majority of them were in the office. It could be 10 o'clock, 12 o'clock, 3 o'clock and it was like a continual lunch hour. And to make sure we were just having one lunch hour we told them at that time we were going to make some changes, some work orders, rearrangement of time, some punching in for lunch and so forth." Bonacci also said he told the men as far back as that same October 15 meeting they would have to punch in and out for lunch. This latter statement is really not true, for the timecards do not show that, and some reveal clearly the men did not start punching for lunch until November 6, the day after they signed the union cards.

Was it an unfair labor practice for the Respondent to have instituted the system just at that moment? I think not. Lunchtime among these employees, as allotted, had always been no more than exactly 30 minutes. A laxity in the practice there was. As the employee witnesses themselves admitted: "We took lunch whenever we could, usually." "Q. Before then, when did you take your lunch? A. Well, usually whenever we had the time. You know, we had trucks coming in and out at all times so when we weren't busy, we would just eat lunch."

Now, it may be that the idleness apparent to the manager was made inevitable because of the reduction in the amount of work to be done, the Chrysler business already down quite before the month of November. The employees had been told, before any union activities, that something like this was going to happen, even if specific words were not used. Moreover, the realities are that whatever management's reason may have been for insisting upon the punching system just that day, it cannot be said that the employees were inconvenienced in any significant way. Unless words are to take the place of substance, it would have to be said that this was not a change in conditions of employment as the phrase is used in the statute. Cf. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976). But even if intent, without accomplishment, can be said to violate the statute, it was a very minor offense indeed.

Everybody in this place was hourly paid. This means that no matter how their paid time was spent, it made no difference to them. Before December the system had long been for the driver of every truck that arrived to note on the back of his shipment order what was wrong with his vehicle or what adjustments were required. He turned the form in to the office, and either Bonacci or the dispatcher then jotted down on a piece of paper what had to be done. Sometimes this note was given to the mechanic who had to do the work and sometimes those instructions about that job were passed to him by telephone. When the mechanic was finished, he told his superior everything was ready and threw away the piece of paper.

Again, several employees testified that with the arrival of the Union they were for the first time told that they would have to write down, on the back of the shipment paper, just what work they had done, what parts had been used, how much time was spent doing this or that repair, etc. They did as they were told. Bonacci, for the Respondent, denied having changed the system just then; he said that always, on occasions at least, the mechanics had been required to and did it. He offered a series of so-called work orders—the backs of the shipment papers—but they do not support his now contention. I find that starting on November 5, 1979, he did in fact, change the system in this respect. Was this also an unfair labor practice, a meaningful change in conditions of employment, a burden "more onerous" put upon the employees in retaliation for the union activities? Or was it no more than "a part of the day-to-day managerial control which it [the employer] was free to exercise?" *Rust Craft, supra.*

The work recording idea was directly tied to the complaint, and warning, to the employees weeks earlier, that they were not doing enough work. With the volume of business falling drastically, as shown clearly on this record, it was a perfectly rational thing for the Company to do, to have the employees make note of when they were working and when they were being paid for idling. There must have been good basis for the Company's concern, for one of the mechanics was offended when Bonacci gave that talk back on October 15. Moates said he had been a sort of supervisor before that date but the next day told management he would no longer do that. Had Bonacci had no basis for telling them that "changes" in methods were going to be made, someone would have spoken up in protest; no one did.

B. *The Discharges*

On December 4, 9 days before the election, the Respondent discharged one of the garage servicemen, a man named Henry Cooper, Jr. On December 14, the day after the election, it discharged Kay and Moates, two mechanics. Not long before December 4 it had lost Cooper, Sr., a mechanic for many years. Copeland, a garageman, never left the Company. This accounts for four men at the time of the events: Cooper, Junior Kay, Moates, and Copeland.

There is a confusion in this record, and it may be attributable to the Respondent's insistence at the hearing that nobody was fired, that every man sent home was only "laid off." It was a pointless statement, because the written notice given to two of the men, at least, when they were released, in so many words told them they were "no longer needed." And 6 months later, the date of the hearing, no one had been recalled. I find they were all fired.

The party stipulated that six employees voted in the election, and that the unit appropriate in the election was limited to the Cleveland location. It therefore excluded DiCapo, who was then assigned to Detroit. It is also a fact Copeland, the garageman, was away from the city and although eligible did not vote. This means there had to be at least seven men in the garage on the day of the election. Whether Cooper, Junior who was "laid off" on December 4, was eligible to vote and was meant to be included in the six whom the parties stipulated did cast ballots, was left vague in the transcript of testimony. What happened to the other three garage employees?

Kay, a witness in support of the complaint, said that "We were all terminated at one time," except for Copeland. And Bonacci, manager, said that six men were terminated. I find, all things considered, that after firing Cooper, Junior, on December 4, the Respondent discharged five more men on December 14. In sum, the action in fact from which a selective allegation of illegality is now made, was the discharge of six men out of a total of seven.[1]

The complaint is limited to three men—Kay, Moates, and Cooper, Junior, each said to have suffered discrimination in violation of Section 8(a)(3). All three had signed union cards, and the Company knew it. Copeland, too, had signed, and Bonacci knew that as well. Did the other three garagemen who were fired also sign union cards? Only three voted in favor of the Union, but then, who knows the vacillations of the human mind? It's the old story: a bunch of people are fired at one fell swoop, you pick those you can prove signed up with the Union, and you focus the charge upon them only.

It is not clear just what the theory of illegality is. Is it that there was no need to fire anybody, that business had not fallen off, and that therefore the entire overall discharges were all unlawful? Or is it that although the Respondent did have economic reason to get rid of people, it deliberately picked the unioneers to give effect to its antiunion animus? Whatever the theory, it is an inference case; no one was told the reason for his discharge was his prounion activity. To the contrary, every man was told that the action taken against him was because there was not enough work to retain him. And, as always, the General Counsel stresses those facts which point a finger of suspicion in support of the complaint, while the Respondent relies on other facts, also relevant, which support a contrary inference. But it is not a question of balance. The General Counsel carries an affirmative burden of proof, and must show, by a preponderance of the affirmative evidence on the record as a whole, that the complaint is in truth supported. *Service Marine Company, Inc.*, 189 NLRB 741 (1971).

C. *Further Evidence, Analysis, and Conclusion*

In the light of the total record, considering both what is said to point to illegal motive and related facts tending to negate that conclusion, I find that the affirmative burden of proof resting upon the General Counsel has not been satisfied.

To start with, there is no direct evidence as an intent to discriminate against these three employees through retaliation for their having signed union cards. True, Bonacci knew Kay and Moates had signed, but interrogation, standing along, does not of necessity prove intent to

[1] In his post-hearing brief, counsel for the Respondent submitted what is said to be a parties' written stipulation of eligibility, made before the election. It lists seven names, including Cooper, Junior, and Copeland. The brief, with the attachment, was served upon the General Counsel. Were it wrong, there would have been opposition; none has been received.

punish. This is equally true as to the manager's change of reporting methods after learning of the Union's activities. He demanded clocking in and out for lunch and making written records of work performance; but even were it to be found that his purpose was to make life a little bit more difficult for all the staff, there is a very great difference between a technical change in record keeping and discharging almost everybody.

Moates testified, without contradiction, that on the evening of December 13, after the results of the morning election were known, Bonacci talked to him, and said "if Ed Kay and myself and John Copeland wanted a union, we should go to a union shop if we wanted to work for a union. . . ." Bonacci also said at that moment "he felt his shop wasn't going to be union because he couldn't work other part-time guys as he would like." After adding Moates "was probably the best worker he ever had," Bonacci closed with "he felt we should go our separate ways."

As I view this entire conversation between the two old friends—Moates had worked here longer than anyone else—it was a discussion as to what the situation was, now that the Union was out of the picture for good. With the employer saying why, with a union in the picture, he would have to pay a price because he would be prevented from using part-time employees—at a lower cost, I presume, the employee explained the benefits that a union could bring him, including such things as better retirement pay than merely social security. When Bonacci then suggested he go to work in a union shop, he was saying no more than that Moates would help himself that way, but that he would hate to lose him for such a reason. I am unable to consider this statement to Moates, that "we should go our separate way," as a "veiled threat of reprisal," as the General Counsel requests. In talking, Bonacci joined Copeland together with Kay and Moates. But, with knowledge of Copeland also having signed up with the Union, the Company did not fire him. More important, the very fact the Company discharged five of the remaining six men the next day virtually dictates a conclusion that the decision to make such a drastic reduction must have already been made. This strengthens the finding, which I read from Moates' total story, that all Bonacci was saying is that if the employees felt that union conditions of employment were better for them they could find that elsewhere.

That this conversation cannot be counted heavily in support of the suggested inference of illegal discharge also flows logically from the fact that the union movement had failed only the day before. Bonacci knew that no matter what the employees did then, there could not be another election for a full year. He had no need to fire anyone at that time to further any antiunion objective.

The real argument made by the General Counsel is based on the timing. The dismissals came the very day after the election. If one looks only at the discharge of the three men named, all of whom the employer knew had signed union cards, and ignores the others who were also sent home, a causal relationship between the union activity and the dismissal seems persuasive. The trouble is, as will be seen below, that the Respondent had pressing reasons to let a lot of people go, if not all. Had Bonacci discharged the men the day before the election, instead of waiting until it was all over, I can imagine the hue and cry that would have been raised. Instead he waited. Had the Union won, he would have been obligated to discuss the effects of his economic decision upon the employees to practically shut the place down. How can he be faulted for taking that chance?

What most effectively offsets any adverse implication that might arise from the timing is the fact, unquestioned on this record, that on December 7, only 7 days earlier, the Respondent had discharged no less than 16 of its then complement of 30 truckdrivers. Seven more have since been released and none replaced. They were represented by the Teamsters, and no charge of impropriety has been filed. Kay, now a complaining witness, admitted the men were told that day that the reason for the mass layoff was "due to business slowing down." What better proof of the Respondent's assertion that business had fallen drastically than this? Neither drivers nor garagemen have been replaced. That this garage had very little truck servicing and maintenance work to do thereafter simply is a stark fact on this record.

There is more evidence of economic justification occasioned by loss of business. Cooper, Junior, who was released on December 4, had been on a 2 months' layoff ending in September because of lack of business. In October, his father, a longtime employee in the garage, quit and was never replaced. After December 15 the dispatcher was let go and the manager took over his duties; the office lady and the cleaning woman were released. None of these three has since been replaced. In fact, no one has been hired at all insofar as this record shows to replace anybody who left, voluntarily or against his will.

In choosing which mechanic to retain, after deciding it would need only one, the Respondent picked DiCapo, instead of either Kay or Moates, who were both senior to DiCapo. Is this enough to prove the complaint allegation? I think not. There is no evidence that the Respondent deviated in this instance from any established seniority practice. Bonacci said DiCapo, although not as long as the others with this Company, was more experienced. Kay, for the General Counsel, referred to DiCapo as "the highest paid mechanic." I do not know how long he had been a mechanic compared with Kay and Moates. His home is in Cleveland and he had been sent to Detroit to help the Company there. They brought him home.

Another point made by the General Counsel is that of the two garagemen, as distinguished from the mechanics, Copeland, who remained, was junior to Cooper, Junior, who left. Both had signed union cards. As to this the record shows clearly that Copeland did a more diversified job than Cooper. In addition to the usual, lesser skilled duties, Copeland actually repaired the truck tires. I have no reason to reject Bonacci's statement that unlike Cooper, Copeland is capable of taking "apart the big truck tires and repair them . . . a very highly dangerous and a special kind of technique."

On December 11, still before the election, Bonacci, who had known the Cooper family for many years, called Cooper, Junior, on the phone and asked what did he think of the Union. Because such a question, even standing alone, seems to fall within the Board's rule against interrogation of employees concerning their union activities, I will find, as the General Counsel requests, that it was another violation of Section 8(a)(1). But in the light of all the related facts, I shall recommend dismissal of the allegation that employees were discharged in violation of Section 8(a)(3) of the Act. See *The Buncher Company*, 229 NLRB 217 (1977). It has been said that suspicion alone does not suffice to prove an unfair labor practice. The facts shown here, clear and uncontroverted, in support of the affirmative defense of discharge for economic reason, are so persuasive that in my judgment there is not even grounds for suspicion.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By coercively interrogating employees concerning their union activities or sympathies, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
2. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

The Respondent, Highway Express, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities or sympathies.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist Automobile Transporters, New Trailer and Armoured Car Drivers, Mechanics and Garagemen Union Local 964, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its place of business in Cleveland, Ohio, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

In all other respects I hereby recommend that the complaint be, and it hereby is, dismissed.

[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT coercively interrogate our employees concerning their union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join or assist Automobile Transporters, New Trailer and Armoured Car Drivers, Mechanics and Garagemen Union Local 964, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

HIGHWAY EXPRESS, INC.